INDEX

Jurisdiction 1
Questions Presented 2
Constitutional and Statutory Provisions Involved ... 2
Statement of the Case 3
Reasons for Granting the Writ 6
Conclusion 11
Appendix 1a

CITATIONS

CASES

A. F. Gordon v. Granville H. Lance, 372 U. S. 368 2a
Carrington v. Rash, 380 U.S. 89 (1965) 5a,6a
Cipriano v. Houma, 395 U.S. 701 (1969) 4a
Fortson v. Morris, 385 U.S. 231 (1966) 6a
Gamillion v. Lightfoot, 364 U.S. 339 (1960) 5a
Gray v. Sanders, 372 U.S. 368 (1963) 4a
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 5a
Hunter v. Erickson, 393 U.S. 385 (1969) 5a
Kramer v. Union Free School District, 395 U.S. 621 (1969) 5a

MISCELLANEOUS

170 S.E. 2nd. 783 (W. Va. 1969) 4a
397 U. S. 1020 (1970) 4a

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75 - 837

Filed December 15, 1975

C. M. Elmore

Petitioner,

vs

THE NORTH BECKLEY PUBLIC SERVICE DISTRICT

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The petitioner, C. M. Elmore, General Delivery Cranberry, West Virginia, Zip Code 25828, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on the 6th day of October, 1975.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether or not Chapter 16, Article 13A, Section 13 of the Code of West Virginia of 1931 as amended, is unconstitutional as repugnant to Section 2 of the Fourteenth Amendment to the Constitution of the United States; Article X,§§1 through 8 of the Constitution of West Virginia.

2. Whether the Respondents denied to the Petitioners equal protection of the law in failure to give proper notice of the creation of the North Beckley Public Service District.

3. Whether or not the Respondent denied to the petitioners' procedural due process in the manner in which they issued an "order" of November 13, 1962 by attempting to correct the non-exixtence of an order or a memorandum in lieu of an order by a **nunc pro tunc** order.

4. Submitting that all of the questions from one to three must be answered in the affirmative, whether or not the Respondents have ever had legal existence and if in the negative, all their actions are void **ab initio;** which we submit is true.

Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment
United States Constitution, Sixth Amendment
United States Constitution, Fourteenth Amendment
West Virginia Constitution, Article X, Section 1 thru 8
West Virginia Constitution, Article 3, Section 9
West Virginia Code, Chapter 16, Article 13A, Section 13
West Virginia Code, Chapter 13, Article 1, Section 4
Code of West Virginia of 1931 as amended, Chapter 54

STATEMENT OF THE CASE

On November 27, 1962 the County Court of Raleigh County met in regular session as shown by the order Book 32 at page 128. The records reveal that during this session, the county court proposed a resolution and order to create the North Beckley Public Service District. In the resolution itself, it is shown as dated on the 13th of November, 1962. A note is appended thereunto stating "(Order should have been entered November 13, 1962, is entered now for then)". This order of November 27, 1962, is in the nature of a **nunc pro tunc** order.

On November 30, 1962 the County Court caused to be published in the Beckley Post Herald a meets and bounds description of the territory proposed to be included within the North Beckley Public Service District. This meets and bounds description had been drawn by an engineer and was not in accordance with the property lines shown by the various property owners in accordance with the deeds recorded in the county courthouse; for example, a deed would say Lot, etc., in Sub-division etc., Section etc., whereas, the meets and bounds description constituted a line of demarkation dividing other property from the property proposed to be included in the North Beckley Public Service District so that the description given by the North Beckley Public Service District engineer or the engineer working for them was not a description that had been theretofore recorded and used in the county courthouse in connection with determining the lines of demarkation of property. This description resulted in a large percentage of the owners of property within and without this area being unable to determine whether their property was included within the district or not, in an infinitesimally small number of people being present at the hearing to vote either for or against. Actually, the only

people that were in favor of the district were prople who were close friends of the persons creating it.

The result of course was that there was little or no opposition to the formation of the district. A board of directors was elected and revenue bond issue was voted for some $900,000.00 to start the matter off. Actually fifty per cent of the eligible people of the district refused to hook onto the line when it was completed.

The reason why the people refused to hook on were twofold.

1. They felt the district had been created without their approval or right to vote pro or con.

2. The right of way necessary to lay the line was arbitrarily taken from the property owners without condemnation proceedings and in many cases by force.

Of the 300 persons protesting the creation of this district, approximately twenty to thirty percent complained that the digging equipment and construction crews would enter their property, dig the ditches for the lines, lay the lines and destroy considerable of the property, shrubs, buildings and fences, all against the will of the property owners.

The above described circumstances resulted in immediate litigation. The district would sue scores of property owners asking for mandatory injunctions requiring them to hook onto the sewer facilities and for the court to levy liens against their property for arrears sewage fees where failure to hook on had been continued over a period of months. The property owners tried to employ counsel from Raleigh County and were unable to get any lawyers who would represent them against their local combine. They finally went as far away as Welch, West Virginia to employ counsel and to Charleston, West Virginia. At one time there were two hundred cases consolidated for hearings in the Circuit Court of Raleigh

County. One of the lawyers applied to the court for a mandatory injunction to require the respondents to dig up their lines on the grounds that they were trespassers since they had not filed condemnation proceedings prior to entry upon petitioners' land. The judge refused the injunction, but in lieu thereof, in all such cases required condemnation proceedings to be filed even though entry upon the land had already been made. This action by the court left two classes of people:

1. People whose land had been entered and who were to receive the reasonable value thereof through condemnation.

2. People whose land was not touched but who were required to hook on and pay arrears fees in amounts as much as $300.00 that had accrued during a period of three or four years.

In class one the liens that had been attached against the people's land where the trespass had occurred were ordered removed by the court.

On at least two occasions appeals were taken to the Supreme Court of Appeals of West Virginia in which constitutional violations were invoked and each time the Supreme Court of Appeals refused to grant Writs of Error.

For the past two years the regular Circuit Judge has refused to sit on matters in which the respondents were involved and a special judge from an adjoining county has been designated. The result has been that in the cases in which the special judge has ordered condemnation proceedings to be brought, only one or two cases have been tried and none of the property owners have actually received any money from the property taken from them. The liens have not been removed from their property and still remain against both classes of property set out above. These liens increase each year since the respondents add the

monthly charge for sewer regardless of whether its used or not, together with interest. The petitioners have repeatedly tried to obtain some relief from the courts of this state without avail. They are no longer able to employee council to represent them and as a last resort are now attempting to represent themselves.

As a last resort therefore, they instituted the proceeding in mandamus against the respondents on the theory that the North Beckley Public Service District has never had status de jure, but only de facto and hence the court should mandamus, order the district and officials thereof to cease and desist from bothering the petitioners any further with respect to connecting with the sewerage facilities, require them to take action to remove all liens from all the petitioners' property and place them in a condition of status quo immediately prior to November 30, 1962. It is from the order denying this petition of the 6th of October, 1975 that these petitioners pray this writ.

REASONS FOR GRANTING THE WRIT

1. The Petitioners claim that the West Virginia Constitution singles out no discrete and insular minority as set forth in chapter 16 of the Code of West Virginia of 1931 as amended and that the three-fifths requirement established by the Constitution of West Virginia applies equally to all bond issues for any purposes, whether for schools, sewers or highways. In the case at bar, approximately thirteen people appeared for this hearing when approximately six hundred were eligible. The reasons were two fold:

1. They did not have notice.

2. The order was not a legal order creating the district. So that not sixty per cent, not ten per cent, not even five per cent of the eligible people in the district had anything to say

as to whether or not this district was to be created or not. In the case of *A. F. Gordon*, et al vs. *Granville H. Lance*, et al, 372 U.S. 368, this court granted a Writ of Certiorari in a similar case. In that case this court said:

> "West Virginia has adopted a rule of decision, applicable to all referenda, by which the strong concenus of three-fifths is required before indebtedness is authorized, does not violate the equal protection clause or any other provision of the constitution."

In *Gordon, supra*, the court said further:

"On April 29, 1968, the Board of Education of Roane County, West Virginia, submitted to the voters of Roane County a proposal calling for the issuance of general obligation bonds in the amount of $1,830,000.00 for the purpose of constructing new school buildings and improving existing educational facilities. At the same election, by separate ballot, the voters were asked to authorize the Board of Education to levy additional taxes to support current expenditures and capital improvements. Of the total votes cast, 51.55% favored the bond issues and 51.51% favored the tax levy. Having failed to obtain the requisite 60% affirmative vote, the proposals were declared defeated.

Following the election, respondents appeared before the Board of Education on behalf of themselves and other persons who had voted in favor of the proposals and demanded that the Board authorize the bonds and the additional taxes. The Board refused.

Respondents then brought this action, seeking a declaratory judgment that the 60% requirements were unconstitutional as violative of the Fourteenth Amendment. In their complaint they alledged that the Roane County Schools had been basically unimproved

since 1946 and fell far below the State average, both in classroom size and facilities. They further allege that six similar proposals had been previously defeated, although each had received majorities of affirmative votes ranging from 51.51% to 55.84%. The West Virginia trial court dismissed the complaint. On appeal, the West Virginia Supreme Court of appeals "reversed, holding that the State constitutional and statutory 60% requirement violated the Equal Protection Clause of the Fourteenth Amendment. 170 S.E. 2nd 783 (W. Va. 1969). We granted certiorari. 397 U.S. 1020 (1970) and for the reasons set forth below we reverse.

The court below relied heavily on two of our holdings dealing with limitations on the right to vote and dilution of voting power. The first was *Gray* v. *Sanders*, 372 U.S. 368 (1963), which held that Georgia's county-unit system violated the Equal Protection Clause, because the votes of primary electors in one county were accorded less weight than the votes of electors in other counties. The second was *Cipriano* v. *Houma*, 395 U.S. 701 (1969), in which we held impermissible the limitation to "property taxpayers" of the right to vote in a revenue bond referendum. From these cases the state court concluded that West Virginia's requirement was constitutionally defective, because the vote of those who favored the issuance of the bonds had a proportionately smaller impact on the outcome of the election than the votes of those who opposed issuance of the bonds.

We conclude that the West Virginia court reliance on the *Gray* and *Cipriano* cases was misplaced. The defect this court found in those cases lay in the denial or dilution of voting power because of group characteristics - geographic location and property ownership - that bore no valid relation to the interest of those groups in the subject matter of the election; moreover, the dilution or denial was

imposed irrespective of how members of those groups actually voted."

"Thus in *Gray, supra,* at 381 n, 12, we held that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit 40% cast for the other candidates being discarded. The defect, however, continued to be geographic discrimination. Votes for the losing candidates were discarded solely because of the county where the votes were cast. Indeed, votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the state-wide total.

Cipriano was no more than a reassertion of the principle, consistently recognized, than an individual may not be denied access to the ballot because of some extraneous condition such as race, e.g., *Gamillion* v. *Lightfoot,* 364 U.S. 339 (1960); wealth, e.g., *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, (1966); tax status, e.g., *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969); or military status, e.g., *Carrington* v. *Rash,* 380 U.S. 89 (1965).

Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. The three-fifths requirement applies equally to all bond issues for any purpose, whether for schools, sewers, or highways. We are not, therefore, presented with a case like *Hunter* v. *Erickson,* 393 U.S. (1969), in which fair housing legislation alone was subject to an automatic referendum requirement."

"The class singled out in *Hunter* was clear - "those who would benefit from laws barring racial, religious, or

ancestral discriminations", supra, at 391. In contrast we can discern no independently identifiable group or category that favors indebtedness over other forms of financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote Cf. *Carrington* v. *Rash, supra,* at 94.

Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult for some kinds of govermental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history or our cases that require that a mojority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electrorate, we have found no constitutional barrier to the selection of a governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris,* 385 U.S. 231 (1966).

The Federal Constitution itself provides that a simple majority vote is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy. The constitution of many states prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bonded indebtedness, "thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less, "important", than matters of treaties, foreign policy or impeachment of public offices is more properly left to the determination by the States and the people than to the courts operating under the board mandate of the Fourteenth Amendment. It must be remembered that in voting to issue bonds voters are committing in part the

credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand. That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of an indebtedness limitation; it does not alter the basic fact that the balancing of interests is one for the State to resolve.

Wisely or not, the people of the State of West Virginia have long since resolved to remove from a simple majority vote the choice on certain decision as to what indebtedness may be incurred and what taxes their children will bear.

We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause. We see no meaningful distinction between such absolute provisions on debt, changeable only by constitutional amendment, and provisions that legislative decisions on the same issues require more than a majority vote in the legislature. On the contrary, these latter provisions may, in practice, be less burdensome than the amendment process. "Chapter 13, Article 1, Section 4 of the Code of West Virginia of 1931, as amended which is bottomed upon Article X§§1 and 8 of the West Virginia Constitution says with respect to the issuance of revenue bonds, "no debt shall be contracted or bonds issued under this Article until all questions connected with the same shall have been first submitted to a vote of the qualified electors of the political division in which the bonds are to be issued, and shall have received *three-fifths* of all the votes cast for and against the same." It is this provision of the statute that *Gordon* v. *Lance, supra,* declares to be constitutional and governing as against a majority vote. In *Gordon, supra,* the court held that a majority vote was not sufficient in a district; that three-fifths of the voters must be in favor of the bond issue. In the case at bar there were

no votes except the possible 13 or 14 people voting for the creation of the district. It simply means that in the instant case we do not have three-fifths; we do not have a majority; we do not have a minority; in fact, we do not have a vote of the people in the district which obligated them to pay for millions of dollars worth of revenue bonds.

The question is how did the board take this action to issue the revenue bonds. The answer is that they did it under the provisions of the Code, 16-13A-13. This is diametrically opposed to Chapter 13, Article 1, Section 4 of the Code of West Virginia which provides, as shown above, that a bond issue may be approved only by a three-fifths majority of all the votes cast for and against the same, and to Article X§§1 and 8 of the Constitution of West Virginia upon which said Code is based.

It is also clearly repugnant to the Gordon case, supra, and to the line of cases cited therein. In respect to the application of the West Virginia Constitutional Requirement and the requirement of Code 13-1-4 that a three-fifths majority vote is required, it is respectfully requested that the court bear in mind that respondents are agencies of the state, the same as all other agencies.

CONCLUSION

It is realized that this Petition is not artfully drawn and that this litigation has not been procedurally well handled because by and large it has had to be handled by laymen due to lack of funds. There is a way now that errors that were committed two years ago and not properly brought to this court's attention procedurally, can now be corrected; except that this court can grant the Writ of Certiorari and order the entire litigation files for review.

As representative of this group of taxpayers who consist by and large of poor retired miners in the low income group in Raleigh County, I am convinced that if this court would properly delve into the matter it would conclude that the constitutional rights of these poor property owners were indeed violated; and issue such instructions to the lower courts as might be calculated to strike out what is in reality a grave injustice, although I am sure to the legal mind, it si now obscured by a procedural nightmare.

RESPECTFULLY SUBMITTED:

C. M. Elmore
General Delivery
Cranberry, West Virginia
Zip Code 25828

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA ex rel TAXPAYERS PROTECTIVE ASSOCIATION OF RALEIGH COUNTY, BOX 236, SPRAGUE, WEST VIRGINIA and ALL OTHERS SIMILARLY SITUATED, C.M. ELMORE, President,
Petitioner

VS. *IN MANDAMUS*
THE NORTH BECKLEY PUBLIC SERVICE DISTRICT,
Respondent

THE APPLICATION OF THE RELATOR FOR A WRIT OF MANDAMUS

The Petitioner, Taxpayers Protective Association of Raleigh County, respectfully represents to the Court that:

I.

The Taxpayers Protective Association of Raleigh County, Box 236, Sprague, West Virginia, is a legally created association chartered on August 24, 1966, and recorded in the County Clerk's Office of Raleigh County, in Book No. 452, at page 299, C.M. Elmore, President.

II.

In regard to the North Beckley Public Service District.

Resolution authorizing the issuance of $930,000, Sewer Revenue Bonds, Series 1964, of North Beckley Public Service District, Raleigh County, West Virginia, to finance part of the costs of construction and acquisition of a complete sewer system for the district.

We, the Taxpayer's Protective Association of Raleigh County, pray that the Supreme Court of Appeals of West Virginia, will rule on the constitutionality of the case laws pertaining to the constitutionality of the bond indebtedness. The West Virginia Constitution singles out no "discreet and insular minority" for special treatment. The three-fifths requirement applies equally to all bond issues for any purpose, whether for schools, sewers or highways.

III.

Article 13A, Section 3, Chapter 134 of the West Virginia Code reads as follows: "From and after the date of the adoption of the order creating any such public service district, it shall thereafter be a public corporation and political subdivision of the State with power of a perpetual succession, but without any power to buy or collect ad valorem taxes. Each such district shall have power to acquire, own and hold property, both real and personal, in its corporate name and shall have power to sue, may be sued, may adopt an official seal.

A. F. Gordon, et al Petitioners v	)))	On Writ of Certiorari to the Supreme Court of Appeal of West Virginia

Granville H. Lance, et al)

Mr. Chief Justice Burger delivered the opinion of the Court:

We granted certiorari to review a challenge to a 60% vote requirement to incur public debt as violative of the Fourteenth Amendment.

The Constitution of West Virginia and certain West Virginia statutes provide that political subdivision of the State may not incur bonded indebtedness or increase tax rates beyond those established by the Constitution without approval of 60% of the voters in a referendum election.

On April 29, 1968, the Board of Education of Roane County, West Virginia, submitted to the voters of Roane County a proposal calling for the issuance of general obligation bonds in the amount of $1,830,000 for the purpose of constructing new school buildings and improving existing educational facilities. At the same election, by separate ballot, the voters asked to authorize the Board of Education to levy additional taxes to support current expenditures and capital improvements. Of the total votes cast, 51.55% favored the bond issues and 51.51% favored the tax levy. Having failed to obtain the requisite 60% affirmative vote, the proposals were declared defeated.

Following the election, respondents appeared before the Board of Education on behalf of themselves and other persons who had voted in favor of the proposals and demanded that the Board authorize the bonds and the additional taxes. The Board refused.

Respondents then brought this action, seeking a declaratory judgment that the 60% requirements were unconstitutional as violative of the Fourteenth Amendment. In their complaint they allegded that the Roane County Schools had been basically unimproved since 1946 and fell far below the State average, both in classroom size and facilities. They further alleged that six similar proposals had been previoulsy defeated, although each had received majorities of affirmative votes ranging

from 51.51% to 55.84%. The West Virginia trial court dismissed the complaint. On appeal, the West Virginia Supreme Court of Appeals reversed, holding that the state constitutional and statutory 60% requirement violated the Equal Protection Clause of the Fourteenth Amendment. 170 S.E. 2nd 783 (W. Va. 1969). We granted certiorari. 397 U.S. 1020 (1970) and for the reasons set forth below we reverse.

The court below relied heavily on two of our holdings dealing with limitations on the right to vote and dilution of voting power. The first was *Gray* v. *Sanders*, 372 U.S. 368 (1963), which held that Georgia's county-unit system violated the Equal Protection Clause, because the votes of primary electors in one county were accorded less weight than the votes of electors in other counties. The second was *Cipriano* v. *Houma*, 395 U.S. 701 (1969), in which we held impermissible the limitation to "property taxpayers" of the right to vote in a revenue bond referendum. From these cases the state court concluded that West Virginia's requirement was constitutionally defective, because the votes of those who favored the issuance of the bonds had a proportionately smaller impact on the outcome of the election than the votes of those who opposed issuance of the bonds.

We conclude that the West Virginia court reliance on the Gray and Cipriano cases were misplaced. The defect this court found in those cases lay in the denial or dilution of voting power because of group characteristics - geographic location and property ownership - that bore no valid relation to the interest of those groups in the subject matter of the election; moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted.

Thus in Gray, supra, at 381 n. 12, we held that the county-

unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit 40% cast for the other candidates being discarded. The defect, however, continued to be geographic discrimination. Votes for the losing candidates were discarded solely because of the county where the votes were cast. Indeed, votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the state-wide total.

Cipriano was no more than a reassertion of the principle, consistently recognized, than an individual may not be denied access to the ballot because of some extraneous condition such as race, e.g., *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); wealth, e.g., *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); tax status, e.g., *Kramer* v. *Union Free School Dist.*, 395 U.S. 621 (1969); or military status, e.g., *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no "discrete and insular minority" for special treatment. The three-fifths requirement applies equally to all bond issues for any purpose, whether for schools, sewers, or highways. We are not, therefore, presented with a case like *Hunter* v. *Erickson*, 393 U.S. 385 (1969); in which fair housing legislation alone was subject to an automatic referendum requirement.

The class singled out in Hunter was clear - "those who would benefit from laws barring racial, religious, or ancestral discriminations", supra, at 391. In contrast we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of

financing. Consequently no sector of the population may be said to be "fenced out" from the franchise because of the way they will vote Cf. *Carrington* v. *Rash*, supra, at 94.

Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult for some kinds of governmental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris*, 385 U.S. 231 (1966).

The Federal Constitution itself provides that a simple majority vote is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy. The constitution of many States prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bonded indebtedness, thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less, "important", than matters of treaties, foreign policy or impeachment of public offices is more properly left to the determination by the States and the people than to the courts operating under the board mandate of the Fourteenth Amendment. It must be remembered that in voting to issue bonds voters are committing in part the credit of infants and of generations yet unborn, and some restriction on such commitment is not an unreasonable demand. That the bond issue may have the desirable

objective of providing better education for future generations goes to the wisdom of an indebtedness limitation; it does not alter the basic fact that the balancing of interests is one for the State to resolve.

Wisely or not, the people of the State of West Virginia have long since resolved to remove from a simple majority vote the choice on certain decisions as to what indebtedness may be incurred and what taxes their children will bear.

We conclude that so long as such provisions do not discriminate against or authorize discrimination against any indentifiable class they do not violate the Equal Protection Clause. We see no meaningful distinction between such absolute provisions on debt, changeable only by constitutional amendment, and provisions that legislative decisions on the same issues require more than a majority vote in the legislature. On the contrary, these latter provisions may, in practice, be less burdensome than the amendment process. Moreover, the same considerations apply when the ultimate power, rather than being delegated to the legislature, remains with the people, by way of a referendum. Indeed, we see no constitutional distinction between the 60% requirement in the present case and a state requirement that a given issue be approved by a majority of all registered voters. Cf. *Clay* V. *Thornton*, 253 S.C. 209, 169, S.E 2nd 617 (1969), appeal dismissed, 397 U. S. 39 (1970).

That West Virginia has adopted a rule of decision, applicable to all bond referenda, by which the strong consensus of three-fifths is required before indebtedness is authorized, does not violate the Equal Protection Clause or any other provision of the Constitution.

IV.

At this very court in case no. 12995 filed December 15,

1970, the ruling of the capital complex, in the Supreme Court of Appeals, West Virginia, it was the ruling of the court. It is the view of this court that the legislature has no such authority, and that if a building complex were to be created involving scores of millions of dollars; it was the duty of the legislature to adopt a resolution placing that question upon the ballot for determination by the people of this state in the same manner in which road bonds were voted upon. Although the bonds in question are designated as revenue bonds. The term revenue bonds means that over a period of twenty or more years.

The respondents authorities seem to admit that this method of financing is at least questionable. They reason, however, that such method is necessary to provide for the acquisition of needed improvements. They would take the matter of financing needed projects out of the hands of the electorate. We believe this is neither advisable nor desirable. We cannot permit the exigency of a situation to override constitutional safeguards.

In considering the constitutionality of a legislative enactment, courts must exercise due restraint in recognition of the principle of the separation of power in government among the judicial, legislative and executive branches. Every reasonable construction must be restored to be the courts in order to sustain constitutionality and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

The following statement appears in *Clayton* v. *Kervick*, 52 N.J. 138, 150 244 A.2nd 281, 287. The common law did not

recognize future rents as present debts or liabilities and the holdings in most of the cases throughout the country dealing with debt limitation clauses are to the same effect. That statement is followed by citation in the opinion of approximately fourteen court decisions, including a decision of the Supreme Court of the United States to the same effect.

The Fourteenth Amendment, after declaring that no state shall make any law which shall abridge the privileges of citizens of the United States, adds: "Nor deny to any person within its jurisdiction the equal protection of the laws." Here is a distinction between citizens of the United States and "any persons," whether citizen or alien, residing or happening to be within the borders of a state. The declaratory clause forbids any abridgement of the rights of citizens of the United States. The remedial clause gives equal protection to all persons whatever while within a state's borders. It establishes equality between all persons in their right to protection, but does not confer equality in the privileges they are to enjoy. It provides that whatever privileges the constitution and laws of the United States confer upon a citizen as a citizen of the United States shall be enjoyed without abridgment, and it provides that all persons within a state, whether a citizen of the United States, or of the states, or aliens, shall be equally protected by the laws in whatever privileges, whether equal or not equal, the may have from the United States or from the state. However, unequally their privileges respectively, yet a foreigner, a citizen of another American state, and a citizen of the state, shall have the benefit equally in the state of all remedial laws for the recovery of rights, and of all legal safeguards ordained for the protection of life, liberty and property.

"It is doubtless true that a state may act through

different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to any action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another, Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion.

The scope of the prohibition of that clause of the Fourteenth Amendment of the federal constitution which forbids any state to deny the equal protection of the laws to any person within its jurisdiction is broader than that of the Fifth Amendment. It applies to, and may be violated by state action of every kind, by any agency or instrumentality, including not only legislative, see infra, subdivision of this section, but also judicial and executive or administrative, action, at least insofar as intentional and arbitrary, or unjust and illegal, discrimination is concerned. It does not apply to action by congress, a territory, an individual or a private corporation, and of course, particular state action, although within its application, may not infringe or violate it.

We cited this constitutional provision to show that the Court, an agent of the state, was requiring some of the inhabitants of the area to hook on to the system and assume the obligation to pay the outstanding bonds while it did not bother in the same or similar circumstance to assume the same or equal responsibility.

With bearing in mind that the North Beckley Public Service District was unlawfully created and does not even have a charter; who high handed, invaded private property without the consent of the property owner or without paying any compensation to the owner or without getting easement or right of way.

On page fourteen (14) on the Bond Resolution.

This Bond is one of an authorized issue of Bonds in the aggregate principal amount of Nine Hundred Thirty Thousand Dollars ($930,000) of like date, tenor and effect except as to number, interest rate, date of maturity and redemption provisions, issued to finance part of the cost of the construction and acquisition of a complete sewer system of the District under the authority of and in full compliance with the Constitution and Statutes of the State of West Virginia, among other things.

The constitution was violated when bonds were sold without the vote of the people and without a referendum election. Placing liens on private owned property to try to force people to connect to the North Beckley Public Service District Sewer System. That it was so constructed that man holes overflowed and raw sewage was dumped into Little White Stick Creek at a pump station setting on the creek bank. And also has a fifteen (15) inch pipe outlet running in this creek. Also, at Cranberry Creek at a pump station which also has a fifteen (15) inch pipe outlet into the creek. This has continued on and off since it was put in in 1965. Manholes have overflowed in different places on peoples private owned property.

That after the North Beckley Public Service District was supposed to have been created and was not feasible the Chairman of the Board of Directors allowed the Raleigh County Airport Authority to put in another Public Service District within the boundary of the North Beckley Public Service District which is in violation with the Bond Resolution on Page thirty-nine (39). And also the law ss 1409 (5) (5) Sewage Treatment Plant. Provided, that such works established or constructed by said sanitary district shall serve and benefit the entire territory within the sanitary and not otherwise. They also allowed another Public Service Lagoon type system to be put right in the

center of the North Beckley Public Service District which is called the Stanaford Acres. Which has a service charge of Three Dollars and Fifteen Cents ($3.15) flat rate a month and approximately one hundred (100) customers. They expect the other people in the North Beckley Public Service District to pay Five Dollars and Sixty Six Cents ($5.66) for the first two thousand (2,000) gallons and we have bills on the average of Thirty Dollars ($30.00) or more a month.

On Page twenty-seven (27) and twenty-eight (28) on the Bond Resolution, *Section 4.03. Sale of the System.* The System may be sold, mortgaged, leased, or otherwise disposed of only as a whole, or substantially as a whole, only if the net proceeds to be realized shall be sufficient fully to pay or redeem at or prior to maturity all the Bonds and the interest thereon, among other things in the Bond Resolution.

On page two (2) on the Bond Resolution, particularly described in and according to the plans and specifications prepared by Holley, Kenney, Schott & Associates, Inc., Consulting Engineers, of Beckley, West Virginia.

That the Taxpayer's Protective Association of Raleigh County can prove that the engineering firm of Holley, Kenney, Schott & Associates, Inc., never made a field survey out in the communities and did in fact overlap Beckley's sewer lines and hooked some of Beckley's customers on to the North Beckley Public Service District. But they did charge for making a field survey, and also charged for residential inspection which was never made. There was never a feasibility study made of the district.

Page thirty-nine (39) of the Bond Resolution.

Section 4.14. No Competition.

The district will not grant, or cause, consent to or allow the granting of any franchise, permit or right to any person,

firm, corporation, body, agency or instrumentality whatsoever for the services provided by the system to or within the district.

That the citizens of the North Beckley Public Service District have been intimidated and threatened to sell their property and placed liens against their property, for not engaging in the illegal sell of bonds that were sold by the North Beckley Public Service District which is not a government agency, and does not do any government business or function in any government business, that the sewer lines were laid through their property without first paying for the reasonable value of the land appropriated and obtaining the consent of each of the defendants to lay said lines, and the defendants say that the property has been taken in contravention of Section 9, Article 3 of the Constitution of West Virginia, and of the Fourteenth Amendment to the Constitution of the United States; and the defendants say that said sewer lines now existing under and upon their property constitute a continuing and illegal trespass and that these plaintiffs have no right in law or equity to maintain said lines upon the respective properties of the defendants herein.

Implied power to issue negotiable bonds when expressly authorized to borrow money.

As a result of the narrow construction of the city's powers to borrow money, many charters now expressly grant municipalities the power to borrow money. Does this express power carry with it an implied power to issue negotiable bonds for the loan? The question is an important one, for it is one of the characteristics of negotiable instruments that certain defenses which would render the instruments unenforceable in the hands of the original holders are lost if they pass into the hands of persons to when they are transferred for value, before

maturity, without notice of such defenses. The Supreme Court of the United States in the case of *Brenham* v. *Bank*(6) held that such a power was not one fairly to be implied as incidental to the express power to borrow money. Three of the nine members of the court, however, dissented from the conclusions of the court, and pointed out that Judge Dillon agreed with their view rather than with that of the majority. Judge Dillon's statement is as follows. "Express power to borrow money, perhaps in all cases, but especially if conferred to objects for which large or unusual sums are required, as for example subscriptions to aid railways and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability. It would seem that the view of the minority of the United States court represents not only the better view, but also the weight of authority.

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* (6) 144 U. S. 173.

Constitutional restrictions on power to incur indebtedness.

Perhaps the reluctance of the courts to imply broad financial powers on behalf of the local corporations is justified by experience, which shows that many of them when granted the wider powers promptly exercised then to so great extent as to become bankrupt. Because of this it is not uncommon to find in the state constitution limitations forbidding the local corporations to borrow beyond certain limits, usually a fixed percentage of their assesed valuation. As usual, these constitutional limitations have given rise to

much litigation. In *Valparaise* v. *Garnder* (7) taxpayers sought an injunction to stop the letting of a contract to a waterworks company for the supply of water for twenty years at $6,000 a year. The municipal corporation had no money in the treasury at the time and had reached the limit not by the constitution to its indebtedness. The constitutional provision in question provided that "no political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the tabable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation shall be sold." The court decided that as the water rent would only become due in annual installments an indebtedness within the meaning of the constitution.

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* (7) 97 Ind. 1. See also *Donovan v. City of Dallas*, 377 U.S. 403 (1964)

On the other hand, in the case of *Spilman* v. *Parkersburg* (8) the court held the obligation incurred was a debt. The facts were that the city, being indebted up to the constitutional limits, entered into a contract which purported to be a lease of an electric lighting plant, paying so much per year, but with an option to buy the plant at the end of the period for $1; plainly, said the court, a contract of purchase, creating a debt for the whole sum due in installments. The distinction between this and the preceding case seems to be that in the former the article, water, was to be furnished from year to year, and the debt accrued at once. From these two cases it is obvious that the

interpretation of these apparently plain constitutional provisions is not so simple as at first sight seems to be the case. A full discussion would occupy more space than is at our command, and we must content ourselves with noticing that some courts hold that the limitation does not apply to indebtedness incurred for expenses imposed upon quasi-municipal corporations by state law, but only to indebtedness voluntarily incurred by the county or town (9), while others adopt the contrary view (10). Perhaps a slight difference in the wording of the constitutional provisions may explain some of the apparent conflict. It is also possible for a city to escape the constitutional provision by providing for assessing the cost of local improvements upon abutting property, so drawing the contracts that no liability to pay rests upon the city (11).

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* (8) 35 W. Va. 605.

(9) *Rauch* v. *Chapman*, 16 Wash. 568.

(10) *Barnard* v. *Knox Co.*, 105 Mo. 382.

(11) *Davis* v. *Des Moines*, 71 Iowa 500.

Right of holders in due course of negotiable bonds: Recitals. In those cases in which municipal corporations have been given power to issue negotiable bonds, it is difficult to determine the question of the rights of holders of the same who have purchased them in good faith, for value, and without notice that certain formalities required by law have not been satisfied. Very often the law requires that the voters of the locality sanction the issue by a majority vote. If this is not done, may a holder in due course, i.e., a transferee for value without notice of the fact that no vote was had, enforce the bonds? It is clear that if the bonds as issued **or as to the prior votes or proceedings of the voters, no recovery can be had, even by a holder in due course (12).**

Where, however, the officers whose duty it is to ascertain whether all conditions required by statute have been complied with, insert in the bonds a recital that they have, e.g., that the election was duly held and a majority vote given sanctioning their issue, it is held that a holder in due course may recover (13). The idea back of this is that the legislature must intend the officials to announce the result and that other persons may rely upon their statements--clearly a fair rule. In the case cited the court put it as follows: "Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested in power to decide whether the condition precedent has been complied with their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal."

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* (12) *March* v. *Fulton Co.*, 10 Wall 676.

(13) *Coloma* v. *Eaves*, 92 U.S. 484.

The limitations on this doctrine are clearly set forth by Mr. Justice Gray of the United States Supreme Court in the case of *Sutliff* v. *Lake County Commissioners* (14): "In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the state, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the fact existed which constituted the statutory or constitutional condition

precedent, and did not require those facts to be made a matter of public records. But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds." In other words, it must appear that the recitals relied upon must be made by officers whose duty it was, under the statute authorizing the issue of the bonds, to ascertain and determine whether all conditions were complied with, "not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally as authentic and final evidence of their existence for the information and action of all others dealing with them in reference to it" (15). In the case from which the foregoing extract is taken, the court concluded that the holder in due course of the bonds in question *could not recover,* as the recitals were not of the required character.

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* (14) 147 U.S. 230

(15) *Harlan, J., in Bank of Toledo v. Porter Township,* 110 U.S. 608

Right to recover from a public corporation in quasi-contract, the principles of the law relating to quasi-contracts are treated as follows: **As pointed out there, the basis of the liability is the fundamental principle that no person shall unjustly enrich himself at another's expense. This principle, of course, may be applied to corporations, private and public, as well as to natural persons. For example, on who paid money to a city for invalid bonds** was permitted, on returning the bonds, to recover, not on the contract contained in the bonds, but on a quasi-contractual

duty to restore the amount paid(16). The bonds were invalid because not having been registered with a state official, but the city officials concealed this by antedating them so that they appeared to have been issued before the act requiring registration went into effect. However, a recovery in quasi-contract will be denied if to permit it will result in destroying the effect of limitations placed upon the powers of a municipal corporation to protect the taxpayers from what is popularly known as "graft". In *McDonald* v. *Mayor of New York* (17) the charter of the city required contracts for the purchase of supplies above a certain amount to be let to the lowest bidder--obiviously to protect the public from the payment of exorbitant prices. The plaintiff furnished supplies to the city in virtue of an agreement not made in accordance with the charter provision. He could not, of course, recover on the contract, as that was clearly void; but sought to reach the same results by relying on the fact that the city had had and used the supplies, and should pay for them, at least, their reasonable value. A recovery was denied, the court saying that all who dealt with the city must at their peril ascertain the limitations contained in the city charter, and that to permit any recovery at all would nullify the limitation in question.

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* (16) City of Louisiana v. Wood, 102 U.S. 294.
(17) 68 N.Y. 23; 23 Am. Rep. 144.

Affirmative damage caused by defective public works. It is a different matter, however, if the city plans a public work, carries it out, and so changes the situation that damage is caused which would not otherwise have been inflicted on the plaintiff (51A). For example in *Seifert* v. *Brooklyn* (53) the city planned a sewer which did not have sufficient capacity to carry the sewage, the result being that

sewage came up through the manholes of the sewer and flooded plaintiff's property. The city was very properly held liable. The difference is between omitting to prevent injury to plaintiff in the second. This very obvious distinction has not been kept in mind, and a general statement that a city is not liable merely because it failed to adopt a plan for adequate public works, true enough when applied to proper cases, has been used to deny liability when the city has acted in constructing a public work so as to damage the plaintiff in a way in which he would not have been injured if the city had not acted. For example, in *Johnston* v. *District of Columbia* (54) foul water from a sewer escaped into plaintiff's land, because of the inadequacy of the original plan in failing to provide for a sewer of sufficient capacity to carry the water and sewage. A recovery was denied, on the ground that the municipality was vested with a discretion in providing public works and the court could not undertake to supervise their exercise of that discretion. The result of such a decision is that if an inadequate plan for a sewer is adopted and injury results, even from a physical invasion of plaintiff's premises, the city is not liable, but if an adequate plan is adopted and defectively executed, the city is liable if the same kind of injury results. This is hardly a satisfactory result, and the better view seems to be that taken in other cases, that, for acts of commission such as this, the city is liable, even if the injury results from a defective plan. It is assumed, of course, that in all these cases the public work is of a private and local character, and not purely public and governmental. As previously stated, the cases are conflicting in their decisions upon these questions it is difficult to state the law with any degree of accuracy. In *Detroit* v. *Beckman* (55) the injury complained of resulted from the adoption by the city of a defective plan for a culvert, the plaintiff driving off the end of the culvert into a ditch. The city was held not liable, on the ground that the adoption of a plan was legislative in

character and adequacy could not be reviewed by the court. The same court, however, holds, the city liable if the act results in a physical invasion of another's property, as in *Ashley* v. *Port Huron* (56); but it seems that the rule ought to be that if the city creates a dangerous situation which did not previously exist and injury results from that, it should be responsible therefor. That was the view taken in *Gould* v. *Topeka* (56A) in which the injury for which the plaintiff recovered resulted from being thrown over the side of an embankment built by the city without any railing or lights, the original plan calling for none. The tendency of the later cases seems to be in the direction of compelling the city to adopt a reasonably safe plan as well as to execute it without negligence after it has adopted it (57), though many still follow the order rule (58).

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*(51a) *Stockstad* v. *Town of Rutland*, 99 N.W. 2nd 813, 8 Wis. 2nd 528, (1959).

(53) 101 N.Y. 136

(54) 118 U.S. 19

(55) 34 Mich. 125.

(56) 35 Mich. 296.

(56A) 32 Kans. 485; 49 Am. Rep. 496.

(57) *North Vernon v. Voegler*, 103 Ind. 314.

(58) *Keeley v. Portland*, 100 Mo. 260.

Liability of public corporations in tort for ultra vires acts. Since a corporation of any kind is not a natural person, the law has always had considerable difficulty in dealing with the question of the responsibility of the artifical legal person for acts done in its name by its members or officers. On the one hand it is urged that since the corporation is only an artifical and not a natural person, it can do only those things it is authorized to do; on the other, it is argued

that in reality the law simply treats the group of persons who are members of the corporation as one person for convenience, and that the group really constitute the corporation. Space fails us to go into this discussion, and we must content ourselves with noticing that today private corporations are held to a very wide responsibility in tort, even for acts involving malice, such as malicious prosecution. In dealing with public corporation, in addition to the difficulties arising in connection with private corporations, we have the additional fact to deal with that usually the members of the corporation, the voters, do not authorize the doing of particular things, as do the stockholders of a private corporation at the stockholder's meeting, but merely elect representatives who do all that is done in the name of the city or other public corporation undertake a work not authorized by the charter and in carrying it on injure someone. In the space at our command we cannot go fully into a discussion of the cases dealing with this subject. If the work undertaken and in the course of which the injury occurs be within the general scope of the authority conferred by the charter upon the municipality and the officers concerned, although actually in excess of those powers, the city is liable; but if the undertaking be wholly beyond the powers of the municipality and its officers, no liability rests upon the corporation(59a.)

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*(59) The introduction of the initiative and referendum will, of course change this in many cases.

(59a) *City and County of Denver v. Austria*, 318 Pac. 2nd 1101, 136 Cole. 454 (1957); McQuillin on Mrn. Corps. (3rd Ed.) Vol. 18, Section 53.60.

Prohibition of special legislation. Aside from the

question of the power of the legislature in dealing with public corporations where no express constitutional provisions are involved, we find that the interpretation of such express provisions as do exist is by no means free from doubt and difficulty.

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*(21) *State* v. *Haben*, 22 Wis. 660.
(22) *Mayor* v. *Baltimore*, 15 Md. 376; *People* v. *Draper*, 15 N.Y. 532.

I. §13-2D-1 Public Bonded Indebtedness
Article 2D
Airport Development Bond Act

§13-2D-3 Definitions read as follows, the following terms, whenever used in this article, shall have the following meaning:

(a) The term "county court" shall mean a governing body created pursuant to Section 22 of Article VIII of the Constitution of this State and any other governing body established in lieu thereof pursuant to Section 29, Article VIII, of the Constitution of this state.

II. The Constitution of West Virginia, Article VIII, Section 22, reads as follows: There shall be in each county of the State a county court, composed of three (3) commissioners and two(2)of said commissioners shall be a quorum for the transaction of business. It shall hold four regular sessions in each year, and at such times as may be fixed upon and entered of record by the said court. Provisions may be made by law for holding special sessions of said court.

Article VIII, Section 29, reads as follows: The legislature shall, upon the application of any county, reform, alter or modify the county court established by this article in such

county, and in lieu thereof, with assent of a majority of the voters of such county voting at an election, create another tribunal for the transaction of the business required to be performed by the county court created by this article; and in such case all the provisions of this article in relation to the county court shall be applicable to the tribunal established in lieu of said court. And when such tribunal has been established it shall continue to act in lieu of the county court until otherwise provided by law.

The Constitution does not give the rights to the West Virginia State Legislature to create a political sub-division, which does not function in any government business. For they were created in Raleigh County for one reason, which is a Sanitary Sewer System and the County Court does not have the authority to appoint a governing board for a public utility of a public corporation. The reason for a political sub-division for the State of West Virginia was one purpose only. To deny the people due process of law and equal protection under the laws in the State of West Virginia and call it an arm of the State.

We want the Supreme Court of Appeals to rule on the constitutionality of the Public Bonded Indebtedness a vote of the people.

We pray that the Supreme Court of Appeals will rule on the Public Bonded Indebtedness, Chapter 16, Article 13A of the Code of West Virginia and also Creation of district by county court Chapter 16, Article 13A, Section 2 of the-Code of West Virginia.

The Taxpayers Protective Association of Raleigh County, West Virginia pray that the court will rule on the West Virginia Code as amendment, 13-2D-3. Definitions on Section 22, Article 8 of the Constitution of State of West Virginia also Section 29, Article VIII of the Constitution of the State of West Virginia.

West Virginia Code, Chapter 16
Public Bonded Indebtedness
Article 2D
Airport Development Bond Act

Sec.	Sec.	Sec.
13-2D-1	13-2D-5	13-2D-9
13-2D-2	13-2D-6	13-2D-10
13-2D-3	13-2D-7	13-2D-11
13-2D-4	13-2D-8	13-2D-12
		13-2D-13
		13-2D-14
		13-2D-15
		13-2D-16
		13-2D-17
		13-2D-18

West Virginia Code, Chapter 16
Article 13A
Public Service Districts for Water
and Sewage Services

Sec.	Sec.
16-13A-1	16-13A-15
16-13A-2	16-13A-16
16-13A-3	16-13A-17
16-13A-3a	16-13A-18
16-13A-4	16-13A-18a
16-13A-5	16-13A-19
16-13A-6	16-13A-20
16-13A-7	16-13A-21
16-13A-8	16-13A-22
16-13A-9	16-13A-23
16-13A-10	16-13A-24
16-13A-11	16-13A-25
16-13A-12	
16-13A-13	
16-13A-14	

Public Bonded Indebtedness

Revenue Bond Refunding Act

13-2D-15 No Notice, consent or publication required.

No notice to or consent or approval by any other county court, other governmental body or public officer shall be required as a prerequisite to the issuance or sale of any bonds or the making of any agreement mortgage or deed of trust under the authority of this article. No publication or notice shall be necessary to the validity of any resolution or proceeding had under this article. (1967, c. 157).

This is one for the record.

The Constitution of West Virginia
Page 47
1966

Constitutional Improvement Amendment; providing for submission of amendments to the voters for ratification or rejection at special elections. Rejected. Vote for, 152, 489; against 252, 822.

The Constitution of West Virginia
Page 48
Amendment to Better Schools Amendment

Reducing vote necessary to approve excess levies and bond issues for school purposes from three-fifths to a majority of the votes cast. Rejected. Vote for 206, 542; against 212, 883.

That the voters have proven to this State of West Virginia by the two above amendments that they want an election on all bond issued for any purpose, school, sewers and highways.

This notice was never served on anyone in the North

Beckley Public Service District except C.M. Elmore which was served approximately three (3) years after the sewer was put in, which is still not completed.

W.VA. Code - Sec. 16-13A-9 - Rules and regulations

* * * * * * * * * *

Whenever any district has made available sewer facilities to any owner, tenant or occupant of any house, dwelling or building located **near** such sewer facility, and the engineer for the district has certified that such sewer facilities are available to and are adequate to serve such owner, tenant, or occupant, and sewage will flow by gravity from such house, dwelling or building into such sewer facilities, the district shall have the immediate right to charge, **and such owner, tenant or occupant shall have the duty to pay from and after the date of receiving notice that such facilities are available,** the rates and charges for services established under this article.

Exhibit D

16-13-18a. Publication of financial statement.

Every sanitary board shall prepare a financial statement and cause the same to be published as a Class 1 legal advertisement in compliance with the provisions of article three, chapter fifty nine of this code, and the publication area for such publication shall be the sanitary district. Such statement shall contain an itemized account of the receipts and expenditures of the board during the previous fiscal year, showing the source from which all money was derived and the name of the person to whom an order was issued, together with the amount of such order, and why such order

was issued, arranging the same under district heads, and including all money received and expended from the sale of bonds, and also a specific statement of the debts of such board, showing the purpose for which any debt was contracted, the amount of money in all funds at the end of the preceding year, and the amount of uncollected service charges. Such statement shall be prepared and published by the board as soon as practicable after the close of the fiscal year: Provided, that such statement for the fiscal year ending June thirtieth, one thousand nine hundred fifty-six, may be published any time during the year one thousand nine hundred fifty-seven. The statement shall be sworn to by the chairman and secretary and treasurer of the board. If a board fails or refuses to perform the duties hereinbefore named, every member of the board concurring in such failure or refusal shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred nor more than five hundred dollars and the circuit court or criminal court and justices of the peace, of the county where the offense was committed, shall have concurrent jurisdiction to try such offense.

AUTHORITIES

Chapter 16, Article 13A, Section 38b of the Code of West Virginia, as amended.
Daughterty v. *Ellis*, 142 W.Va. 340, 97 S.E. (2nd) 33.
State v. *Morris*, 91 W.Va. 269, 112 S.E. 519.
Barbor v. *County Court*, 85 W.Va. 359, 101, S.E. 721.
Goshorn v. *County Court*, 42 W.Va. 735, 26 S.E. 452.
5 M.J., Counties, Section 24.

DISCUSSION

The Legislature of the State of West Virginia, in Chapter 16, Article 13A, of the Code provided for the creation of

public service districts in the exercise of its police powers. In Section 38b of said Article 13A, the Legislature established the procedure to be followed in the creation of such districts. Among other things, it is set out in said section that:

> "When the County Clerk of any county enters an order on its own motion proposing the creation of a public service district, as aforesaid, the County Court **shall** at the same session fix a date of hearing in such county on the creation of the proposed public service district, which date so fixed shall not be more than forty days nor less than twenty days from the date of such action." (Emphasis supplied)

This statute under which the County Court of Raleigh County undertook to act, mandatorily required the fixing of a date for hearing in the session at which it proposed to create the North Beckley Public Service District. It is clearly provided by the statute that such date of hearing shall not be more than forty days nor less than twenty days from the date of the entry of the order proposing the creation.

In the case at bar, the action of the County Court proposing the creation of the North Beckley Public Service District was entered of record on the 27th day of November, 1962, and it fixed the date for hearing on the 11th day of December, 1962, some fourteen (14) days later. It is significant that the records of all prior sessions of the County Court are silent as to the proposal to create said North Beckley Public Service District. In the absence of recording its action, the County Court could not have and did not effectively act in regard to the creation of the North Beckley Public Service District prior to November 27, 1962.

In *Daughterty* v. *Ellis*, 142 W.Va. 340, 97 S.E. (2nd) 33, the Supreme Court of Appeals of West Virginia, speaking through Mr. Justice Haymond, said (97 S.E. (2nd) at 40):

"A county court, a corporation created by statute, can do only such things as the law authorizes it to do and must act in the manner prescribed by law. (Citations omitted). A county court can exercise its powers only as a Court, while in legal session with a quorum present, and it must follow that procedure and enter its proceedings of record to make its action valid and binding. (Citations omitted.)"

In State ex. rel. *Tyler County Court* v. *Morris*, 91 W.Va. 269, 112 S.E. 519, the Court said (112 S.E. at 520):". . . all proceedings of the county court are required to be entered of record. Without this, there can be no binding action of the court."

In view of foregoing authority which is based not only on the decisions cited, but upon authorities cited in those decisions which have been omitted, it is quite clear that no legal action was taken by the County Court of Raleigh County in respect to the creation of the North Beckley Public Service District until November 27, 1962. The statute, hereinbefore referred to, authorizing the creation of public service districts and prescribing the method of their creation does not say that the county court **may** fix the date for public hearing on the proposed creation of such a district in not less than twenty nor more than forty days, the statute clearly states that the county court **shall** set such hearing date at a time in not less than twenty nor more than forty days. The purpose for this seems obvious. The minimum period of time as additional notice to the public. The County Court of Raleigh County certainly had no authority to attempt to improvise or to alter the statute.

The county court is possessed only of such powers as are expressly conferred by the Constitution and Legislature, together with such powers as are reasonably and necessarily implied in the full and proper exercise of the powers so

expressly given. It can do any such things as are authorized by law, and in the mode prescribed.

Barbor v. County Court, 85 W.Va. 359, 191 S.E..721;

Goshorn v. *County Court*, 42 W.Va. 735, 26 S.E. 452.

The County Court of Raleigh County attempted to create the North Beckley Public Service District in a manner specifically contrary to the mandatory provisions of law. Since the North Beckley Public Service District was invalidly created, it has no power to function and no standing in this court.

PROPOSITION

The County Court of Raleigh County, West Virginia, in entering its order on the 27th day of November, 1962, proposing the creation of the North Beckley Public Service District, had no power or authority to relate the entry of said order back to the 13th day of November, 1962.

AUTHORITIES

Gandy v. *Elizabeth City County*, 179 Va. 340, 19 S.E. (2nd) 97;

Chaney v. *State Compensation Commissioner*, 127 W.Va. 521, 33 S.E. (2nd) 284;

Council v. *Commonwealth*, 198, Va. 288, 94 S.E. (2nd) 245;

Stannard Supply Company v. *Delmar Coal Company*, 110 W. Va. 560, 158 S.E. 907;

Baker v.*Gaskins*, 125 W.Va. 326, 24 S.E. (2nd) 277;

11 M.J., *Judgements and Decrees*, Section 39, 40 and 41.

DISCUSSION

On the 27th day of November, 1962, the county court met in regular session as shown by the opening order of the court recorded in Commission Record Book 32. at page 128. The records reveal that during this session, the county court proposed a resolution and order to create the North Beckley Public Service District. In the resolution itself, it is shown as dated on the 13th day of November, 1962. A note is appended thereunto stating "(Order should have been entered November 13, 1962, is entered now for then)". This order of November 27, 1962, is in the nature of a **nunc pro tunc** order.

It is not disputed that the office of a **nunc pro tunc** judgment or order is to record some act of the court done at a former time which is not then carried into record. A retroactive order of this character may be used to make the record speak that truth, but not to make it speak what had not been spoken, even though it ought to have been spoken. In the case at bar the note clearly states that the order should have been entered on the 13th day of November, 1962. The records of the County Clerk of Raleigh County show that the order was entered on the 27th day of November, 1962.

In *Baker* v. *Gaskins*, 125 W.Va. 326, 24 S.E.(2d) 277, the Supreme Court of Appeals held:

"A judgment which, by the order for its entry, is shown to have been rendered on the date stated therein, cannot by a subsequent provision in the order, be made to take effect as of an earlier date."

The records of the November 13, 1962, session of the county court are silent and without mention of the North Beckley Public Service District. However, the indispensible premise for the entry of a **nunc pro tunc** order is that the

action of the court be taken at the time to which it relates. If there must be recorded evidence of the action of the court at the time to which the order relates.

In *Chaney* v. *State Compensation Commissioner*, 127 W.Va. 521, 33 S.E. (2d) 284, the Court held:

> "As a prerequisite to entry of a **nunc pro tunc** order reasonable notice must be given to a party who may adversely be affected and order may be made only upon showing of some entry or memorandum upon the records of quasi records of the court evidencing its prior action, and parol evidence of such action is inadmissible until entry or memorandum is produced."

In *Stannard Supply Company* v. *Delmar Coal Company*, 110 W. Va. 560, 158 S.E. 907, the Court held:

> "In this state the rule is that a **nunc pro tunc** order can only be made upon the showing of same entry or memorandum upon the records or quasi records of the court, and that parol evidence of the rendition of the judgment and its terms cannot be received, at least until such entry or memorandum is produced."

The only evidence of action on the 13th day of November, 1962, in record to the North Beckley Public Service District is the other itself, purporting to be dated on the 13th day of November, 1962. That order was not made a part of the court's records until November 27, 1962. It is very clear that the rule in this jurisdiction is that there must be some written memorandum entered of record on the date of the action to justify the entry of a **nunc pro tunc** order.

There is yet another reason why the action of the County Court of Raleigh County in attempting to relate the entry o the order back to November 13, 1962, is invalid. In accordance with the provision of Article 8, Section 24, of

the Constitution of the State of West Virginia, county courts are vested with judicial authority in all matters of probate, the appointment and qualifications of personal representatives, guardians, committees, curators, and in the settlement of their accounts, and in all matters relating to apprentices. In addition to such judicial powers, the county courts are vested with the power and authority, under such regulations as may be prescribed by law, to supervise and administer the internal police and fiscal affairs of their counties. In attempting to create the North Beckley Public Service District, the county court undertook to exercise, not its judicial powers, but its police powers as delegated to it by the legislature. Query, as to whether in the exercise of its non-judicial power, the County Court of Raleigh County, West Virginia, was vested with the power and authority to enter a **nunc pro tunc** order. We think not, the judgments of the courts clearly indicate that a **nunc pro tunc** order is an instrument whereby courts of records may prevent injustices in the determination of judicial matters.

PROPOSITION

The plaintiff, in its action against the defendants, employes a department of the state government, the judiciary, to deny these defendants equal protection of the laws in violation of their constitution guaranty.

AUTHORITIES

Central Kentucky Natural Gas Company v. Railroad Commission of Kentucky, 37 F. (2nd) 938;

16 C.J. 2nd, Section 505 (page 994);

4 M.J., Constitutional Law, Section 126;

State v. *Goodwill*, 10 S.E. 285

DISCUSSION

It cannot be denied that there are several people residing in the area described as the North Beckley area that are not using the sewage facility. The North Beckley Public Service District in its memorandum to present and prospective customers, bearing date the 25th day of April, 1962, acknowledged that the burden on the properties or liabilities of the users would necessarily increase unless all persons to whom the service has been made available connect on and pay their share of the cost of construction and maintenance. By its action against these defendants it seeks decree of the court, a state agency, imposing a burden upon the property of these defendants when there are many other persons of the same burden who are presumable exempted. It should be borne in mind that there are not actions to establish a right on the part of the plaintiff, but to require these defendants to assume a burden and act in the affirmative subject to the penalties of the court while others admittedly in the area and identically situated are not being required, **not even asked,** to do so. It cannot be presumed that the exempted persons will voluntarily place themselves in a position of having to share this enormous burden.

The Equal Protection Laws of the Fourteenth Amendment of the Federal Constitution may be violated by action of the judiciary as well as by the legislative or executive departments of government. In 4 Michie's Jurisprudence, Constitutional Law, Section 126 at (page 218), it is said that:

> "It is doubtless true that a state may act through different agencies, either by its legislative, its executive, and its judicial authorities; and the prohibition of the amendment extends to any action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another."

In 16 Corpus Juris Secundum, at page 988, in discussing the equal protection clause of the Constitution, it is written that:

> "This clause is a pledge of equal protection of the laws or protection of equal laws; and it means, and is a guaranty, that all persons subjected to state legislation shall be treated alike under like circumstances and conditions, **both in privileges conferred and liabilities imposed.**" (Emphasis supplied)

The very gist of this action is to impose upon these defendants liabilities and burdens in connection with the financing of the facility because of their location within the district. It is of no consequence that other actions may be commenced against other parties. If decrees are entered, these defendants will be burdened while others remain exempt. The law is so written that a public service district has the authority to require all persons falling within a certain class to bear their proportionate share of the burden. Neither the person nor property of an individual should be subjected to any liability or burden except by law or rule which operates equally on all persons in the same situation.

PROPOSITION

The motes and bounds description of the territory proposed to be included in the North Beckley Public Service District, as published in the *Beckley Post Herald* on November 30, 1962, was not sufficient to identify said territory to the persons residing in or owning or having an interest in property in said territory and therefore an opportunity to be heard for or against the creation of said public service district was effectively denied to the interested parties.

DISCUSSION

The court has previously indicated if the motes and

bounds description of the territory to be included in the North Beckley Public Service District is legally sufficient to set out the perimeter of the territory, then such a motes and bounds description is sufficient to satisfy the requirements of Chapter 16, Article 13A, Section 38B, of the Code of West Virginia. It is submitted that this point of view is erroneous and for the record, these defendants and various defendants in the suits presently pending wish to file affidavits executed by property owners within the territory all to the effect that after reading said description that they were unable to determine that their property is located therein.

Section 38B provides: "All persons residing in or owning or having any interest in property in such proposed public service district shall have an opportunity to be heard for and against its creation." It is submitted, therefore, that the meaning of the statute in reference of the sufficiency of the description and notice of public hearing required to be advertised is that said description convey to the interested parties reasonable notice as to the territory to be embraced. Was the description as advertised reasonably sufficient for such purpose? It is now known that the territory embraced by the purported North Beckley Public Service District includes many communities well known by their community and area names, such as "Sprague", "Cranberry", etc. It is not argued here that the motes and bounds description will suffice to withstand the test of time in identifying the territory. However, it is argued that in addition to the legal description, there should have been designated the names of the communities to be embraced therein. The statute clearly contemplates that the parties be given an opportunity to be heard. It is submitted that the notice was not designed in such a way as to do this. Legal identification of a parcel of property by a motes and bounds description does not in and of itself relate notice. A motes

and bounds description of ones own residential property could be advertised in a newspaper and without other reference, such as the name of the registered owner, would not serve as adequate notice to the property owner.

These defendants ask only that the court peruse the description as advertised in this case to determine if said description gives reasonable notice to the property owners in the communities within the North Beckley Public Service District.

PROPOSITION

Presupposing the validity of the creation of the North Beckley Public Service District, said district, as a public corporation and a political subdivision of the state, should not be permitted to maintain suit for equitable injunctive relief because said district has taken and/or damaged private property for public use in these premises without just compensation.

AUTHORITIES

Article III, Section 9, West Virginia Constitution;

Chapter 54, Article I and II, of the Code of West Virginia, as amended;

Hardy v. *Simpson*, 113 W. Va. 440, 190 S.E. 680;

Riggs v. *State Road Commissioner*, 120 W. Va. 298 197 S.E.813;

State v. *Graney*, 143 W. Va. 610, 103 S.E. (2nd) 878.

DISCUSSION

It has heretofore been argued that the North Beckley Public Service District was not created in the manner

provided by stature and herefore, has no standing to sue in this court. If, however, the Court should find that its creation was validly effected, then, by the terms of the statutes (1409, 38C), said public service district is a public corporation and political subdivision of the state. It is a fact that said public service district did not acquire permission from these defendants or permission from any of the defendants in the actions now pending for entry upon or right-of-way across their properties. It is also a fact that said public service did not file condemnation proceedings and did not obtain an order from this court permitting it to enter upon, take possession, appropriate, and use the real estate of any of the defendants. This is the procedure established in such cases by Chapter 54, Article II, Section 14, of the Code of West Virginia. By ignoring this proceeding, the said public service district, and its contractor or contractors became trespassers when they entered upon the property of these defendants.

It must be remembered that these defendants and the other defendants in the actions now pending in this court are not afforded the right to institute an action against the North Beckley Public Service District for their alleged grievances. This must be done in condemnation proceedings. In this connection the syllabus in *Hardy* v. *Simpson*, 118 W. Va. 440 190 S.E. 680, 681, Points 1 and 2, are as follows:

> "1. Section 9, Article 3, of the Constitution, which provides that 'Private property shall not be taken or damaged for public use, without just compensation,' requires action on the part of the state, its subdivisions or instrumentalities, to ascertain damages and compensate owners of property for the taking thereof or damage thereto, incident to any public improvement for which such property may be appropriated."
>
> "2. Where the construction or improvement of a state

highway results in damage to private property short of the actual taking thereof, it is the duty of the State Road Commission, under Code, 54-2-14, and within a reasonable time after the completion of the work out of which such damage arises, to institute proceedings to ascertain the damage to which the owner of such property may be entitled."

In *Riggs* v. *State Road Commission*, 120 W.Va. 298, 197 S.E. 813, and in *State* V. *Graney*, 143 W. Va. ascertaining and compensating for the damages it has done, and in violation of the constitutional right of these defendants to be fairly and justly compensated for the damage, the North Beckley Public Service District instituted this action as plaintiff seeking the equitable relief of a mandatory injunction. It is submitted that before said district should have obtained equitable relief, it should have been done equity to these defendants. In equity and good conscience, the plaintiff should not have been awarded the relief granted by the trial court.

EXHIBIT A

Board of Commissioners
North Beckley Public Service District
Raleigh County
Skelton, West Virginia

Gentlemen:

For your legally issued, properly executed $930,000 North Beckley Public Service District, West Virginia Sewer Revenue Bonds, Series of 1964, to finance the construction of your project as described in your consulting engineer report dated December 1, 1963, which is made a part hereof by reference, we will pay the sum of $883,500 plus accrued interest from the date of the bonds to the date of delivery.

EXHIBIT A LETTER

The customary closing certificates including a non-litigati certificate.

Where there can be no litigation it gives the North Beckley Public Service District a perfectly right to embezzle, misappropriate and misuse funds. A perfectly right to envade private property without paying just compensation to the property owner.

Both the North Beckley Public Service District and its employees or any agent of the State of West Virginia does as they please and all the cases that has been filed in the Circuit Court of Raleigh County, West Virginia. They would just let them lay on the Court Docket and throw them out of Court. The taxpayer protective association of Raleigh County, West Virginia would like to know why certain classes of people is locked out of court? While other classes has a free hand at the Court and their cases are settled according to law and the Constitution of the State of West Virginia.

It appears to the Taxpayer's Protective Association of Raleigh County, West Virginia that Exhibit A give the law firm of Steptoe and Johnson, Attorneys at Law, Clarksburg, West Virginia and the Law Firm of Bowers, File, Hodson and Payne, Beckley, West Virginia. That these two law firms can take the law into their own hands and say who will be tried in a Court of law and who won't be tried. Locking the citizens of the North Beckley Public Service District out of Court. Denying them equal protection of the law and deny them of their Constitution Guarantee of equal protection of equal law.

LIENS

C 16-13A-10

Lien not a deprivation of property without due process. The provision that delinquent fixed rates and charges for services rendered by a public service district shall be a lien on the premises served of equal dignity, rank and priority with the lien on such premises of state, county, school and municipal taxes, does not deprive the owners of their property without due process of law. State ex rel. *McMillion* v. *Stahl,* 141 W. Va. 233, 89 S.E. 2nd 693 (1955).

It may not deprive the owner of the use of his property. But even if he is not hooked on the sewer and not using it and goes to borrow money from a bank or saving and loan company. They try to blackmail him and make him pay back sewer bills (which he has not used the sewer) before he can borrow any money. We would like a answer on this question?

CONSTITUTIONALITY

1. That the provisions of the statute granting a tax exemption to the property income and bonds of the Board is in violation of Section 1, Article 10 of the Constitution of West Virginia.

2. That the statute improperly delegates legislative powers to administrative body; in violation of the Constitution of West Virginia.

3. That the statute providing for liens to enforce the payment of fees, rates and charges violates the Fourteenth Amendment to the Constitution of the United States, etc;

4. That the grant of eminent domain violates the Constitution of this State of West Virginia.

5. That the statute creating a mortgage lien on the property and authorizing foreclosure creates a debt of

public service districts without a vote of the people in violation of the Constitution of this State of West Virginia.

6. That by creating public service districts as public service corporations for special purposes, violates the constitution of this State of West Virginia.

Respectively Submitted by
Taxpayers
Protective Association of Raleigh County, West Virginia

(President) C.M. Elmore
General Delivery
Cranberry, West Virginia 25828

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of October, 1975 the following order was made and entered, to-wit:

State of West Virginia ex rel. Taxpayers
Protective Association of Raleigh County
etc., et al.

vs. Mandamus

The North Beckley Public Service District

On a former day, to-wit, September 22, 1975, came the petitioner, Taxpayers Protective Association of Raleigh County, by C. M. Elmore, President, pro se, and presented to the Court their petition and exhibits, and note of argument in support thereof, praying for a peremptory writ of mandamus to be directed against The North Beckley Public Service District, as therein set forth. And came also File, Payne, Scherer & Brown and W. H. File, Jr., council

for the North Beckley Public Service District, in opposition to granting the writ of mandamus. Upon consideration the Court is of opinion that a rule should not be awarded and the prayer of the petition is therefore denied.

A True Copy

Attest: George W. Singleton

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Charleston

State of West Virginia ex rel
Taxpayers Protective Association of Raleigh
County, Box 236, Sprague, West Virginia and
All others Similary Situated, C.M. Elmore,
President

Petitioner No. _____

VS: **In Mandamus**

Section 3 Article 13A Code of West Virginia

The North Beckley Public Service District of Raleigh County, is from and after this date of the adoption of the order creating any such public service district it shall thereafter be a public corporation and political subdivision of the State of West Virginia.

Appeal

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that the Taxpayers Protective

Association of Raleigh County, Box 236, Sprague West Virginia and all Others Similarly Situated, C.M. Elmore, President, the Petitioner In Mandamus in the above-captioned proceeding hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of the State of West Virginia entered in this action on September 19, 1975.

C. M. Elmore

President Taxpayers Protective
Association of Raleigh County
Box 236, Sprague, West Virginia
and all others Similarly Situated

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL

State of West Virginia

County of Raleigh, To-Wit:

The Taxpayers Protective Association of Raleigh County, Box 236, Sprague, West Virginia and all Others Similarly Situated C.M. Elmore, President, the Petitioner

In Mandamus herein, despose and say that on the 31st day of October 1975, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon the North Beckley Public Service District, 106 McCreery St. (Raleigh County) Beckley, West Virginia petitioner In Mandamus, by delivering the same to Robert R. Thompson, Jr. (Office) Chairman of the North Beckley Public Service

District, 106 McCreery St. (Raleigh County) Beckley, West Virginia

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Subscribed and sworn to before me Raleigh County at Beckley, West Virginia, this 22 day of October, 1975

Sandra Jean Via
Notary Public and for
Raleigh County, West Virginia

My Commission Expires September 29, 1979